

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT KNOXVILLE
June 1, 2005 Session

BEN D. BRADEN v. BOEING-OAK RIDGE COMPANY

**Direct Appeal from the Chancery Court for Knox County
No. 159768-2 Daryl Fansler, Chancellor**

Filed October 21, 2005

No. E2004-02194-WC-R3-CV - Mailed August 15, 2005

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law. After a bifurcated hearing on the issue of causation, the trial court found plaintiff's cirrhosis of liver condition was not caused by his exposure to methyl ethyl ketone (MEK) and methyl ethyl toluene (MET) and dismissed the complaint. Plaintiff's appeal challenges the ruling upon the ground the trial court failed to properly weigh the expert testimony and also upon the ground the trial court applied an incorrect standard of law to the case. We find the evidence preponderates in favor of the conclusion of the trial court and affirm the judgment in all respects.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Chancery Court is Affirmed.

ROGER E. THAYER, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, J., and WILLIAM H. INMAN, SR. J., joined.

Matthew J. Evans and John W. Elder, Knoxville, Tennessee, for Appellant, Ben D. Braden.

Timothy W. Conner, Knoxville, Tennessee, for Appellee, Boeing-Oak Ridge Company.

MEMORANDUM OPINION

In this case the complaint was dismissed after a bifurcated hearing resulting in a finding the plaintiff's condition or injury was not caused by his exposure to chemicals at his workplace.

Limited Factual Background

The employee, Ben D. Braden, a fifty-year-old high school graduate, was employed by defendant, Boeing-Oak Ridge Company, from 1987 through 1994. In the course of his employment, he came into contact with certain industrial chemicals. These chemicals were methyl ethyl ketone (MEK) and methyl ethyl toluene (MET) and they were used as cleaning agents. He testified that he had to transfer the solvents from a large container to a smaller one and dispense the solvent to other departments in the company. He said it was not unusual for some of the product to splash on his hands. He stated most of the exposure was to the chemical MEK.

The employee testified he weighed about 300 pounds and kept that weight for many years. He was diabetic and did not drink alcohol. In 2002 he had knee replacement surgery and began to have high weight gains. He eventually came under the care of Dr. Silver who after much examination and testing advised him he had cirrhosis of the liver. After some period of treatment, the doctor referred him to Mayo Clinic for further treatment and possible liver transplant.¹

All of the evidence in this case was presented to the trial court by deposition accompanied by numerous exhibits of medical records, etc.

Medical Evidence

Dr. Steven Silver, a Knoxville board-certified gastroenterologist, was the primary treating physician and he began treating plaintiff during September 2002. The doctor stated his field of specialization covered the study of the gastrointestinal tract and all abdominal organs including the liver. He said plaintiff had cirrhosis of the liver and that cirrhosis was a more advanced liver disease which was permanent and in this case a terminal condition without a transplant.

He testified many things can cause cirrhosis such as hepatitis B or C or an overload of iron but his testing for these causes were negative. He also indicated there was a long lesser list of other known causes and that testing for these causes was also negative. He stated a liver biopsy was performed and there was no fat or steatosis which really surprised him. After excluding all known causes for cirrhosis, Dr. Silver concluded plaintiff's condition was due to his exposure to the chemicals at his place of work and he said he reached this diagnosis because he could not find any other known cause. The doctor testified that plaintiff also suffered from some memory loss and disorientation.

¹ Plaintiff received a liver transplant shortly before the trial of this case on July 28, 2004.

During the course of the deposition, Dr. Silver was asked “how is methyl ethyl ketone and toluene metabolized in the body?” His reply was:

Well, again, I don’t understand all the metabolic pathways of these toxins or chemicals, potential toxins. Some of these toxic substances are directly toxic to the liver. The organelles of the - - the internal cellular components can be directly damaged by some chemicals. With some chemicals, it’s not the - - the chemical itself but the metabolites or derivatives of those chemicals, can cause injury. The different mechanisms, free radicals - - again, this gets into a lot of chemical analysis and metabolic pathways that are a little bit beyond the scope of my expertise.

The doctor was also asked if he had researched or examined medical literature with regard to the toxicity of MEK and MET to the liver and he replied he had so examined the literature and found that there were reports of solvents in the workplace causing liver disease and that studies he had examined involved shoe repairmen and printers.²

On cross-examination the doctor admitted that the study of “Liver Damage Among Shoe Repairers” involved multiple industrial solvents and did not specifically identify exposure from MEK or MET. As to the study “Liver Structure and Function in Print Workers Exposed to Toluene”, the doctor stated the article began by stating, “[a]n unresolved controversy is whether exposure to organic solvents in the work-places causes hepatotoxicity”. Dr. Silver also testified he was not aware of any study in the medical literature confined only to exposure of MEK and MET and the disease cirrhosis.

The defendant employer presented evidence of two doctors which conflicted with the conclusion of the treating physician on the causation issue.

Dr. Donna Seger, board-certified in emergency medicine and medical toxicology, testified she was an assistant professor of medicine and emergency medicine at Vanderbilt University and also medical director of the Tennessee Poison Center. She is also involved in one clinic a week where she sees individuals who are ill and have had an occupational exposure and she is to determine whether or not the occupational exposure caused the illness. However, she is not involved in the treatment of any of the individuals.

Dr. Seger said toxicology was the study of poisons or adverse agents that can affect people. She stated MEK is a solvent and in the workplace it is used as a cleaning agent. She said the main adverse effect to the body is damage to the central nervous system. She said MET is also a solvent with similar characteristics and it can affect the central nervous system in a different way and also affects the kidneys. She testified that under the current state of medical science and medical

² These medical articles were filed as exhibits 7-9 to the doctor’s deposition.

literature, there was no causal link between exposure to MEK and cirrhosis of the liver. She said there must be animal evidence, case reports and clinical trials in order to properly connect the exposure of an agent to a disease and without these factors one cannot make a causation association. She said it was not proper to conclude that a causation element is established just because an illness occurred after exposure. Dr. Seger was of the opinion that plaintiff's diagnosis of cirrhosis was not caused by his exposure to either MEK or MET. She said this conclusion was not to say that these chemicals had no adverse effect on the body, as exposure to MEK can rive up or cause liver enzymes to become elevated, but "that is a far cry from progression to cirrhosis. . . . It doesn't mean that there's actually a pathologic change to the structure of a cell, which is what happens with cirrhosis."

Dr. Michael K. Porayko, a hepatologist and specialist in liver transplant medicine, testified he was an associate professor of medicine at Vanderbilt University and the medical director of liver transplant. He is board-certified in internal medicine and gastroenterology. He stated hepatology was the study of the liver and he sees and treats patients who have diseased liver conditions due to environmental exposure.

Dr. Porayko said plaintiff had risk factors for what is known as metabolic syndrome. These risk factors were abdominal obesity, diabetic, low HDL cholesterol and high blood pressure. He said metabolic syndrome was a setup for the development of fatty liver or nonalcoholic steatohepatitis and that fatty liver disease is slow in progression and about 30 percent of patients develop cirrhosis. He pointed out that not finding fatty liver on a single biopsy specimen of the liver should not cause one to rule out nonalcoholic steatohepatitis because many times when you have a good specimen to examine the fat will either not be found anywhere or will be patchy so that on a single biopsy you may not pick it up.

The doctor was of the opinion that the most likely cause of plaintiff's cirrhosis was nonalcoholic fatty liver disease that progressed to cirrhosis. He said he noticed in the medical records a 1993 lab report indicating plaintiff had a low platelet count and many times that was the first indicator of cirrhosis. With reference to plaintiff's exposure to chemicals at his workplace, he said he had examined toxicology books and neither MEK nor MET were listed as potential agents to cause cirrhosis and the reason for that was there was not sufficient data to put it on the list. He said that exposure to these chemicals could enhance a person's liver disease just like alcohol could.

Ruling of the Trial Court

At the conclusion of the trial, the Chancellor issued a lengthy opinion summarizing all of the pertinent evidence and finding that the plaintiff had failed to carry the burden of proof on the issue of whether the chemical exposure during the employee's work-related activity caused his cirrhosis of the liver. In so finding and holding, the court specifically found that the testimony of Dr. Seger and Dr. Porayko was more convincing and credible than the testimony of the primary treating physician, Dr. Silver.

Standard of Review

The review of the issue on appeal is *de novo* accompanied by a presumption of the correctness of the findings of the trial court unless the preponderance of the evidence is otherwise. Where all of the evidence is presented by depositions and other documents, the appellate court is in as good a position as the trial court in reviewing and weighing testimony. *Landers v. Fireman's Fund, Inc. Co.*, 775 S.W.2d 355, 356 (Tenn. 1989).

Analysis of Issues

_____ On appeal plaintiff urges us to reverse the decision of the Chancery Court because the Chancellor failed to properly weigh the evidence and because the court applied an incorrect standard of law to the facts of the case.

As to the claim the trial court failed to give proper weight to the testimony of the treating doctor, Dr. Silver, we find that the trial court is not bound by any particular evidence but has the discretion to decide which evidence is acceptable when it is in conflict. *Thomas v. Aetna Life & Cas., Co.*, 812 S.W.2d 278 (Tenn. 1991); *Johnson v. Midwesco, Inc.*, 801 S.W.2d 804 (Tenn. 1990). On appeal we must make an independent assessment of the evidence and determine where the preponderance of the evidence lies.

In examining the trial court's opinion, we find that he did "consider" the evidence of Dr. Silver but declined to accept it on the causation issue. Dr. Silver admitted he came to the conclusion the chemicals MEK and MET caused the plaintiff's cirrhosis because he could not find any other known medical cause and he also admitted that rendering an opinion on how the chemicals were metabolized in the body was a little bit beyond the scope of his expertise. In opposition to this conclusion, Dr. Seger testified there was no casual link between exposure to the chemicals and cirrhosis under the current state of medical science. Dr. Porayko was of the opinion plaintiff's condition was most likely caused by nonalcoholic fatty liver disease.

Plaintiff insists the trial court erred in failing to hold the treating doctor's testimony outweighed the testimony of the non-treating experts citing several cases where the courts had held the treating doctor's testimony was entitled to greater weight. We are not aware of any rule of law that a treating doctor's evidence *must* be accepted over the opinions of non-treating experts as insisted by plaintiff. Credibility issues are different in every case and cannot be transferred from one case to another. The same witness may or may not be credible when testifying even in a series of cases.

From our independent review of the evidence, we find the evidence preponderates in favor of the ruling of the trial court.

It is also insisted the trial court applied an incorrect standard of law to the case by requiring plaintiff to establish conclusive evidence as to the cause of plaintiff's cirrhosis condition. We have

carefully reviewed all of the court's opinion and findings and have determined there is no merit to this contention.

Conclusion

Having found that the evidence preponderates in favor of the defendant employer on the causation issue, the judgment of dismissal is affirmed. Costs of the appeal are taxed to the plaintiff and his surety.

ROGER E. THAYER, SPECIAL JUDGE

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JUDGMENT ORDER

This case is before the Court upon the motion for review filed by Ben D. Braden pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law.

It appears to the Court that the motion for review is not well-taken and is therefore denied. The Panel's findings of fact and conclusions of law, which are incorporated by reference, are adopted and affirmed. The decision of the Panel is made the judgment of the Court.

Costs are assessed to plaintiff-appellant, Ben D. Braden, and his surety, for which execution may issue if necessary.

It is so ORDERED.

PER CURIAM

Barker, C.J., not participating